

FCTC Comments (Attn: Ms. Monica Swann)  
Office on Smoking and Health  
200 Independence Avenue, SW., Room 317-B  
Washington, DC 20201

For the Record on the WHO Framework  
Convention on Tobacco Control

Dear OSH:

The tobacco hazard has long been known. By 1836, i.e., 164 years ago, it was well-established "that thousands and tens of thousands die of diseases of the lungs generally brought on by tobacco smoking. . . . How is it possible to be otherwise? Tobacco is a poison. A man will die of an infusion of tobacco as of a shot through the head." Samuel Green, *New England Almanack and Farmer's Friend* (1836).

"The physician must recognize the fact that smoking is a universal affair . . . harmful . . . to normal people. . . . [changing them into the injured category]." Schwartz, Herbert F., M.D., "Smoking and Tuberculosis," 45 *New Y St J Med* (#14) 1539-1542 (15 July 1945).

Shortly the Royal College of Physicians of London, *Smoking and Health Now* (London: Pitman Medical and Scientific Publishing Co, 1971), p 9, had already declared the smoking-caused death toll a "holocaust" due to the then "annual death toll of some 27,500."

"Over 37 million people (one of every six Americans alive today) will die from cigarette smoking years before they otherwise would." See the U.S. Department of Health, Education and Welfare, National Institute on Drug Abuse (NIDA), book, *Research on Smoking Behavior*, Research Monograph 17, Publication ADM 78-581, p v (December 1977).

Please include the words of the 1897 Tennessee law banning the sale of cigarettes, as upheld in *Austin v Tennessee*, 179 US 343 (1900), as the cigarette hazard was already then known. The Tennessee law made it unlawful: "for any person, firm, or corporation to sell, offer to sell, or to bring into the state for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same" (Acts of 1897, ch 30).

In affirming a conviction under the law, the Tennessee Supreme Court said, ". . . cigarettes . . . are . . . wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They . . . are inherently bad, and bad only . . . widely condemned as pernicious altogether . . . impairment of physical health and mental vigor. . . ." *Austin v State*, 101 Tenn 563, 566-567; 48 SW 305, 306; 70 Am St Rep 703 (1898). These words alone, without more, provide clear basis for a cigarette sales ban.

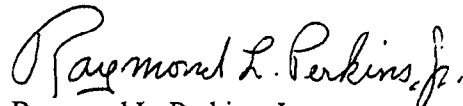
Alternatively, the words of Michigan law MCL § 750.27, MSA § 28.216 ("Any person within the state who manufactures, sells or gives to any one, any cigarette containing any ingredient deleterious to health or foreign to tobacco, shall be guilty of a misdemeanor") should be adopted. As that law dates from the 1909-1931 period, and more cigarette-hazards data exists now than then, the proposal should define such acts as a felony, not a mere misdemeanor, pursuant to extant case law, e.g., *People v Carmichael*, 5 Mich 10; 71 Am Dec 769 (1858); *People v Stevenson*, 416 Mich 383; 331 NW2d 143, 145-146 (1982); and *People v Kevorkian*, 447 Mich 436, 494-496; 527 NW2d 714, 738-739 (1994), making providing a toxic substance causing foreseeable death, a felony, regardless of the delayed reaction of the body to the toxin.

Please explicitly reference and incorporate the already existing common law concept that "No one has a right to have his property burn, if thereby the property of others is endangered. The right to extinguish fires . . . is a part of the police power. . . . It may be exercised not only without the consent of the owner of the property on fire, but against his will." *Wamsutta Mills v Old Colony Steamboat Co*, 137 Mass 471, 473; 50 Am Rep 325, 326-327 (5 Sep 1884). The use of fire is of course, of the essence in smoking. (Unlit cigarettes are not what the problem is about!) Conclusion: In view of the holocaust level of deaths, cigarette manufacture and sales should be recognized as banned by already existing law, and criminal prosecutions ensue.

Lastly, as cigarettes are harmful when used<sup>AS</sup> by manufacturers intend, the WHO proposal should explicitly recognize that once cigarettes are recognized as banned as above stated, the issue of smoking would be moot. But nonetheless, the proposal should explicitly incorporate by reference the already existing common law "Right to Fresh and Pure Air" that has been developed since at least the year 1306 and has a long record of judicial recognition, dating from *Rex v White and Ward*, 1 Burr 333 (KB, 1757) and *Rex v Neil*, 2 Carr & Payne 485 (Eng, 1826) ("It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air").

March 18, 2000

Respectfully,

  
Raymond L. Perkins, Jr.